NO. 82-18

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES R. BALKCOM, WARDEN,

Petitioner

vs.

GUY MASON,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JAMES C. BONNER, JR.
Counsel for the Respondent
University of Georgia School of Law
Prisoner Legal Counseling Project
475 North Lumpkin Street
Athens, GA 30601

QUESTION PRESENTED

Did the Respondent concede an intent to kill which rendered a burden-shifting instruction on that element harmless beyond a reasonable doubt under the actual circumstances of his case?

TABLE OF CONTENTS

	Page
Summary of the Argument.	1
Argument	1
Conclusion	4

TABLE OF AUTHORITIES

	Page
Andres v. United States, 333 U.S. 740 (1948)	4
Bohlman, United States v., 625 F.2d 751 (6th Cir. 1980)	2
Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981). . .	4
Chapman v. California, 386 U.S. 18 (1967).	4
Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980), cert. denied, 451 U.S. 1028 (1981)	1, 3
Krzeminski v. Perini, 614 F.2d 121 (6th Cir. 1980), cert. denied, 449 U.S. 866 (1980)	1
Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982) . .	2
Reeves, United States v., 594 F.2d 536 (6th Cir. 1979), cert. denied, 442 U.S. 946 (1979). . . .	1
Spradlin v. State, 151 Ga. App. 585, 260 S.E.2d 517 (1979).	2
Thomas v. Anderson, 675 F.2d 781 (6th Cir. 1982) . .	1
United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947)	3
Statute Cited:	
Ga. Code Ann. §26-902	2

SUMMARY OF THE ARGUMENT

The actual record does not support the Petitioner's assertion that the Respondent's intent was not an issue in his trial. It was, just as it may be in any case involving self-defense. But even if it were not, that critical element of the offense could not constitutionally be removed from the state's burden through an instruction relieving it from the obligation of proving it.

Finally, it is the Petitioner's duty to prove harmlessness beyond a reasonable doubt. Even if his legal analysis were viable, he could not prove harmlessness in this death penalty case because the transcript of the closing arguments do not exist and no one can accurately determine that the intent issue was not actually presented to the jury.

ARGUMENT

THE RECORD DOES NOT SUPPORT THE PETITIONER'S POSITION THAT INTENT WAS NOT AN ISSUE IN THE RESPONDENT'S TRIAL.

The linchpin of the Petitioner's harmless error argument is that the Respondent's intent to kill was not really an issue in his murder trial but in effect was conceded when he raised "self-defense." He therefore could not have suffered harm from an instruction shifting the burden of proof on that essential element of the offense. See United States v. Reeves, 594 F.2d 536 (6th Cir. 1979), cert. den., 442 U.S. 946 (1979), Krzeminski v. Perini, 614 F.2d 121 (6th Cir. 1980), cert. den., 449 U.S. 866 (1980), Thomas v. Anderson, 675 F.2d 781 (6th Cir. 1982).

This theory of harmlessness is different from how the issue has been treated in other lines of cases. E.g., Holloway v. McElroy, 632 F.2d 605, 617-18 (5th Cir. 1980), cert. den., 451 U.S. 1028 (1981)

(challenged instruction related only to a greater charge on which the jury acquitted); United States v. Bohlman, 625 F.2d 751 (6th Cir. 1980); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982) (burden-shifting instructions harmless because the evidence of guilt was "overwhelming"). In this case, the Respondent was not only convicted but sentenced to death for the crime to which the instruction related. In addition, the Court of Appeals explicitly considered the evidence in his case to be "far from ...overwhelming" (App. A of Petition, p. 22) and the Petitioner has not urged otherwise. These lines of cases are therefore inapposite.

If criminal defense were just a matter of labels and neat compartments of facts and issues, then the Petitioner's position might have some appeal. After all, a popular paradigm of self-defense is probably: "I killed the deceased and I meant to because he was wrongly attacking me and it was necessary." But it is nowhere engraved in stone or even printed in the text of the Georgia statute, Ga. Code Ann. §26-902, that an accused who raises a defense which can be generally characterized as "self-defense" necessarily admits that he intended to kill. Just because self-defense can extend so far that it may justify, excuse, or mitigate (see, e.g., Spradlin v. State, 151 Ga. App. 585, 260 S.E.2d 517 [1979]) even an intentional killing does not mean that it is unavailable as a defense to killings which were less than intentional. It does not mean that any disputing the intent to kill may not attempt to justify or excuse his lethal actions as a legitimate reaction to another's threat. After all, as the Court of Appeals observed, "one can shoot to kill in self-defense, shoot to wound in self-defense, shoot to frighten in self-defense, or even shoot reactively in self-defense with no specific purpose" (App. A of Petition, pp. 24-25).

Boiled down to its core, self-defense is nothing more than a claim to have been justified in using force against "[an]other's imminent use of unlawful force," Ga. Code Ann. §26-902(a). The most basic paradigm of the defense in a homicide case is "I killed the deceased but I am guilty of no crime because I was reacting to his wrongful attack."

Although the defense highlights controversy over the element of "unlawfulness" as murder is defined under Georgia law (see Holloway v. McElroy, supra at 628), it does not necessarily "give away" other elements of the crime, such as intent. The most generally concedes is identity as to the killer. The accused can still put the prosecution to its proof on those elements, the prosecution still has to establish them, and the jury still has to find them. Cf., United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947).

Casting the labels aside, what exactly was the Respondent's defense in this case?

As the Petitioner himself pointed out,

> The [R]espondent's testimony, on both direct and cross-examination, gives no indication of his intent at the time of the shooting and defense counsel made no attempt to elicit such testimony, thereby, indicating that intent was not a disputed issue." (Petition, p. 22.)

Not addressing an issue is quite a far cry from specifically admitting it. But most importantly, the Respondent's testimony was not silent in this respect.

After testifying that he "went to shooting" when the victim drew her gun on him (Trial Transcript, pp. 109, 113, 114), the Respondent elaborated on cross-examination:

> Q: ...[W]hen you shot the first time, what happened?
> A: When I shot the first time, I just shot.
> Q: What did you shoot at?
> A: I don't know.
> Q: Did you shoot at her head?
> A: I don't know.
> Q: Did you shoot her anytime while she was on her way to the ground?
> A: I don't know. I just shot. (Trial Trs. 116.)

The plain thrust of his testimony was the he fired reactively without formulating any particular intent.[-2)] It certainly did not amount by any stretch of imagination to an admission or concession of an intent to kill. To the extent that the Petitioner has an

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[-2)] The evidence reflected that the Respondent fired four shots at close range. Two missed the victim, one wounded her non-fatally in the thigh (Trial Trs., p. 53), and the fourth struck her in the head and killed her.

analytically sound argument, this is the wrong case for it. The record in this case simply does not eliminate intent as an issue. See Burton v. Bergman, 649 F.2d 428 (6th Cir. 1981).

Moreover, it is the State's burden to establish harmlessness beyond a reasonable doubt, Chapman v. California, 386 U.S. 18 (1967). This is a burden which, if anything, is enhanced in a case involving the death penalty. See Andres v. United States, 333 U.S. 740, 752 (1948). As the concurring Judge below observed, it is an impossible burden to carry in the absence of a complete record (App. A of Petition, pp. 26-30). The record in the Respondent's case never included the critical closing arguments. Without them, whatever the transcript of the evidence reflects and however the law of self-defense may be analysed, no one can certify that intent was not an issue as the case went to the jury.

CONCLUSION

This case does not offer a record which viably supports the issue which the Petition raises. This Court should deny a writ of certiorari.

JAMES C. BONNER, JR.
Counsel for the Petitioner

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Petitioner

vs.

GUY MASON,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 1982, I mailed first-class a copy of the foregoing to the counsel for the Petitioner, Assistant Attorney General Janice G. Hildenbrand, 132 State Judicial Building, 40 Capitol Square, SW, Atlanta, Georgia 30334.

James C. Bonner, Jr.

JAMES C. BONNER, JR.
Counsel for the Respondent

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MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Rule 46 and 28 U.S.C. 1915(a), the Respondent Guy Mason, by counsel, respectfully moves this Court for leave to appear and proceed in forma pauperis.

He has been allowed to proceed as a pauper in all of the prior proceedings below and his circumstances, as an indigent resident on Georgia's "death row," have not changed.

His affidavit of poverty is attached.

James C. Bonner, Jr.

JAMES C. BONNER, JR.
Counsel for the Respondent

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AFFIDAVIT OF POVERTY

I, Guy Mason being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of the proceeding or to give security therefor, that I believe I am entitled to redress;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
   1974 - $600.00 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

   _____

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

   approximately $ 30.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

   a. If the answer is yes, describe the property and state its approximate value.

   _____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Barry Mason

SUBSCRIBED AND SWORN TO before me this 24th day of September, 1982.

Jay L Causey

NOTARY PUBLIC My commission expires NOV. 22, 1984

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ 338 32 on account to his credit at the ~~[illegible]~~ G.D.C.C. institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said NONE institution: NONE

Leonard Cargile